

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CLIFFORD P. PHILLIPS,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 97-244-B
)	
KENNETH S. APFEL,)	
Commissioner of Social Security,¹)	
)	
<i>Defendant</i>)	

RECOMMENDED DECISION ON MOTION TO DISMISS

Appearing *pro se*, the plaintiff has filed a civil action against the Commissioner of Social Security, accusing the Social Security Administration of discrimination, and of causing the plaintiff anguish, pain and suffering, in connection with his request for Supplemental Security Income (“SSI”) benefits. The Commissioner moves to dismiss the complaint for lack of jurisdiction. The plaintiff has filed no response to the Commissioner’s motion and is therefore deemed to have waived any opposition to the dismissal motion. *See* Loc. R. 7(b).

Approximately a year and a half ago, this court dismissed on jurisdictional grounds a previous lawsuit filed by the plaintiff against the Commissioner. *See* Order Affirming the Recommended Decision of the Magistrate Judge (Docket No. 10) in *Clifford Phillips v. Shirley S. Chater, Commissioner of Social Security*, Civil Docket No. 96-133-B. Specifically, the court dismissed the previous case because the only decisions of the Social Security Administration which

¹ The complaint names the Social Security Administration as the defendant. Kenneth S. Apfel, the Commissioner of Social Security, is the appropriate defendant in a case challenging a decision of the Social Security Administration and I have accordingly redesignated the title of the case. *See* Loc. R. 3(c) and Appendix I thereto (Model Complaint).

the court has jurisdiction to review are “final decisions of the Commissioner made after a hearing,” as opposed to refusals to reopen prior claims for benefits. *See* Recommended Decision on Defendant’s Motion to Dismiss (“Recommended Decision”) (Docket No. 8 in Civil No. 96-133-B) at 4 (quoting *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 795 (1st Cir. 1987)). As noted therein, the only exception to this jurisdictional bar is a complaint that states a “colorable constitutional claim.” Recommended Decision at 4 (quoting *Torres v. Secretary of Health & Human Servs.*, 845 F.2d 1136, 1138 (1st Cir. 1988)).

The Commissioner’s motion to dismiss the instant case does not specify which provision of the Federal Rules of Civil Procedure he claims entitles him to dismissal, but it is reasonable to infer that he invokes Fed. R. Civ. P. 12(b)(1), governing cases in which the court lacks subject matter jurisdiction. Unchallenged by the plaintiff is the Commissioner’s assertion that the instant case raises the same issues as the previously dismissed proceeding. *See* Defendant’s Motion to Dismiss (“Commissioner’s Motion”) (Docket No. 5) at 1 n.2. However, the Commissioner also notes that certain events have occurred following the previous dismissal, *viz*: a determination on June 17, 1997 that the plaintiff’s SSI benefits would be reduced because he lives with another SSI beneficiary and is thus considered part of an “eligible couple,” Exh. 4 to Declaration of John J. Timlin (“Timlin Decl.”), Attachment I to Commissioner’s Motion, at 1; a decision on June 28, 1997 not to reconsider the denial of the plaintiff’s 1988 application for SSI benefits (as distinct from the 1995 application on which the plaintiff has been receiving disability benefits), Exh. 3 to Timlin Decl. at 1; and the pendency of a hearing before an Administrative Law Judge concerning the plaintiff’s status as half of an “eligible couple,” based on a reconsideration request filed by the plaintiff’s live-in companion, *see* Declaration of Alfred M. Sapienza, Attachment III to Commissioner’s Motion; Request for

Hearing by Administrative Law Judge, Exh. 6 to Timlin Decl. It is apparent that none of the administrative proceedings that have followed the dismissal of the previous complaint have generated a final decision of the Commissioner of which this court may assume jurisdiction. The Commissioner is therefore entitled to dismissal of the instant case for precisely the same reasons stated in my Recommended Decision in Docket No. 96-133-B.

Accordingly, I recommend that the Commissioner's motion to dismiss the complaint be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 4th day of March, 1998.

*David M. Cohen
United States Magistrate Judge*